***OPEN SESSION***
**AGENDA ITEM**

**NOV 2018 RAD ITEM II.B**

**NOV 2018 Board of Trustees, ITEM 54-123**

**DATE:** **11/15/2018**

**TO:** **Members, Regulation and Discipline Committee**
**Members, Board of Trusteess**

**FROM:** Suzanne Grandt, Assistant General Counsel, Office of General Counsel

**SUBJECT:** Proposed State Bar Rule of Procedure, rule 5.137: Return from Public Comment and Request Submission to California Supreme Court for Approval.

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## EXECUTIVE SUMMARY

At its July 2018 meeting, the State Bar Regulation and Dicipline Committee ("RAD") authorized a 60-day public comment period for a proposed State Bar Rule setting forth guidelines for the imposition and collection of sanctions to be ordered by the California Supreme Court when imposing suspension or disbarment of an attorney. The proposal was submitted pursuant to Cal. Bus. & Prof. ("B & P") Code, § 6086.13, which requires the State Bar to adopt such a rule, to be approved by the California Supreme Court. The State Bar received one public comment during the 60-day public comment period.

This agenda item responds to the one public comment received and makes a non-substantive clarification to the proposed State Bar Rule. Staff recommends approval of the proposed State Bar Rule of Procedure, rule 5.137 for submission to the California Supreme Court.

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## BACKGROUND

On July 19, 2018 RAD authorized a 60-day public comment period for a proposed State Bar Rule setting forth guidelines for the imposition and collection of sanctions to be ordered by the California Supreme Court when imposing suspension or disbarment of an attorney. The public comment period began on August 2, 2018, and closed on October 2, 2018.

The State Bar received one public comment, from David C. Carr. The full text of this comment is provided as Attachment A.

## DISCUSSION

### i. Return from Public Comment

The one public comment regarding proposed rule 5.137 is from attorney David C. Carr. *See* Attachment A. Mr. Carr opposes the proposed rule on three separate grounds. ***First***, he argues it is premature to draft a rule until the California Supreme Court directs the State Bar to do so, which it has not done in 25 years. ***Second***, he asserts that the rule is at odds with the principles of the attorney discipline system, which is public protection and not punishment. ***Third***, he notes that the State Bar already has a difficult time collecting costs from disciplined attorneys, making it impractical that the State Bar will see any benefit to its Client Security Fund ("CSF"), the ultimate recipient of the sanctions pursuant to B & P Code, § 6086.13.

As to his first concern, Mr. Carr is correct that the California Supreme Court must authorize the imposition of monetary sanctions. However, proposed rule 5.137 was drafted pursuant to B & P Code, § 6086.13, which ***requires*** that the State Bar adopt rules setting forth guidelines for the imposition and collection of monetary sanctions. There is nothing in this statute to suggest that the State Bar must wait until direction from the California Supreme Court. Rather, the State Bar must adopt rules "with the ***approval*** of the California Supreme Court" (emphasis added). As such, the State Bar has drafted a rule, which it will submit to the California Supreme Court for approval. It is then up to the California Supreme Court to determine whether such a rule is appropriate at this time.

As to his second concern, Mr. Carr is also correct that there is significant legislative history and case law emphasizing that the primary purpose of attorney dicipline is public protection. However, the State Bar is acting pursuant to a state law, which requires it to adopt specified rules. *See* B & P Code, § 6086.13. The State Bar is not authorized to ignore this legislative mandate for policy reasons.

In any event, the legislature has already determined that certain costs imposed in connection with attorney disciplinary proceedings are consistent with the public protection purpose of the State Bar. In 2003, the legisature added subsection(e) to B & P Code, § 6086.10, the statute requiring disciplinary orders to include payment of disciplinary costs. Subsection (e) states:

> In addition to other monetary sanctions as may be ordered by the Supreme Court pursuant to Section 6086.13, costs imposed pursuant to this section are penalties, payable to and for the benefit of the State Bar of California, a public corporation created pursuant to Article VI of the California Constitution, to promote rehabilitation and to protect the public. This subdivision is declaratory of existing law.

Lastly, as to Mr. Carr's third concern, the State Bar recognizes the practical difficulty in collecting costs from disciplined attorneys. This difficulty does not justify non-compliance with B & P Code, § 6086.10.

### ii. Clarification to Proposed State Bar Rule of Procedure, rule 5.137

Staff recommends a non-substantive addition to proposed State Bar Rule of Procedure, rule 5.137. Proposed rule 5.137(G) lists factors to be considered by State Bar Court in setting the amount of recommended sanctions. Staff recommends adding langauge to clarify that the State Bar Court may consider past misconduct when applying the listed factors.

A red-lined version of proposed State Bar Rule of Procedure, rule 5.137 is provided as Attachment B. A clean, revised version of proposed State Bar Rule of Procedure, rule 5.137 is provided as Attachment C.

## FISCAL/PERSONNEL IMPACT

If adopted, the proposed rule may provide additional funding to the State Bar Client Security fund. *See* B & P Code, § 6054(a).

The proposed rule may necessitate additional resources in OCTC and State Bar Court in order to assess monetary sanctions recommendations, handle respondents' challenges to sanctions, and evalute respondents' requests for sanctions' waivers, reductions or payment plans.

## STRATEGIC PLAN, GOALS, & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licenses in California.

Objective: F: Support adequate funding for the Client Security Fund.

## RECOMMENDATION

**It is recommended that the Regulation and Discipline Committee and Board of Trustees approve the following resolution:**

**RESOLVED,** that staff submit to the California Supreme Court for approval proposed State Bar Rule of Procedure, rule 5.137, attached hereto as Attachment C.

## ATTACHMENT(S) LIST

**A. Text of David C. Carr's Public Comment**

**B. Redline of proposed State Bar Rule of Procedure, rule 5.137**

**C. Proposed State Bar Rule of Procedure, rule 5.137**

# ATTACHMENT A

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October 2, 2018

Via email: suzanne.grandt@calbar.ca.gov

Suzanne C. Grandt
Office of General Counsel
180 Howard St.
San Francisco, CA 94105

Re: Monetary Sanctions in Disciplinary Proceedings .

Dear Ms. Grandt:

This comment pertains to the proposal to adopt State Bar Rule of Procedure 5.137 to implement monetary sanctions in discipline proceedings consistent with Business & Profession Code section 6986.13.

I oppose the rule as and urge the Board of Trustees not to approve it. It is premature to draft rules until the Supreme Court directs the State Bar to do so. It has not done so in almost 25 years. Because the statute represents an explicitly punitive sanction, at odds with the long-established law, any major change in policy should be at the direction of the Supreme Court. The statute clearly states that rules may only be promulgated at the direction of the Supreme Court.

One of the most firmly established principles of the attorney discipline proceedings is that its exists solely to protect the public, the justice system, confidence in profession and high professional standards, and does not exist for the purpose of punishment (Standard 1.1 Standards for Attorney Sanctions of Professional Misconduct; *In re Vaughan* (1922) 189 Cal. 491, 496.) The California Supreme Court early discerned the danger of confusing the two (see *Marsh v. State Bar of Cal.*, (1934) 2 Cal. 2d 75, 78: "It must first be noted that although the word 'punishment' is frequently used, the discipline of an attorney is not punitive in character.)

The Legislature recently reinforced at least part of this bedrock principle by amending Business and Professions Code section 6001.1 to provide that "Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

25 years ago the Legislature gave the State Bar a different direction in the form of Business and Professions Code section 6086.13, which purportedly instructs the State Bar to draft the rules that the subject of this comment.

The source of this Legislative direction is lost in the mists of State Bar history but probably originated in the report of the Discipline Evaluation Committee aka the Alarcon Committee, a blue-ribbon panel headed by former Federal Judge Richard Alarcon that issued its report in 1994. Or maybe some other commission, report or State Bar study; there have so many that they begin to blur with the the passing years. Many of the Alarcon Commissions recommendations were acted on, and this is probably one of them.

While some perfunctory work was done to promulgate regulations pursuant to 6068.13(c), the effort was abandoned sometime in 1995 after negative public comment to the first version and never resumed until this year. No one seemed to notice until recently. The reasons why the State Bar ignored this seeming Legislative mandate are unknown, at least to the authors of the current proposal.

I don't know the reasons either, but my own reaction, as a prosecutor in the Office of Chief Trial Counsel in 1994 was that the imposition of monetary sanctions, even for the noble purpose of funding the Client Security Fund, was punitive and incompatible with the principle that discipline is not intended to be punitive. Discipline is not intended to be pain-free, quite the opposite, but if discipline, with all its consequences, is greater than necessary to protect the public, it is unfair and improper.

That is the principle and the ease with which we lapse into describing it as "punishment" (as the *Marsh* court noted) shows the difficulty in drawing that line. In the name of protecting the public, we have embraced inflicting much pain on disciplined attorneys, including the imposition of ruinous costs, especially if you seek to defend yourself, and the prospect of perpetual public professional ignominy. There has to be a point where discipline becomes so onerous that even the broadest definition of public protection doesn't cover it. But a discipline system that is constantly being prodded to be more aggressive in protecting the public might not see it.

Early case law referred to the discipline process as being quasi-criminal (*Vaughan*, at 496; *In re Ruffalo* (1968) 390 U.S. 544, 551). But the judicial response to attempts to apply criminal law concepts, like double jeopardy and restrictions on search and seizure, to discipline was to emphasize its limited nature as public protection "The purpose of disbarment proceedings is not to punish the individual but to determine whether the attorney should continue in that capacity' [citation] 'in short, to reform the offender or else remove him from practice' [citation] *Emslie v. State Bar* (1974)11 Cal. 3d 210, 225.)

What makes a sanction punitive? The Ninth Circuit had this to say in I*n Re Dyer:*

> We recently explained the difference between civil sanctions and criminal sanctions: Civil penalties must either be compensatory or designed to coerce compliance [citation]. In contrast,

"a flat unconditional fine totaling even as little as $50" could be criminal "if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance," and the fine is not compensatory. [citation] This is so regardless of whether the non-compensatory fine is payable to the court or to the complainant. [citation]. Whether the fine is payable to the complainant may, however, be one relevant factor in determining whether the fine is compensatory or punitive

*In re Dyer,* 322 F.3d 1178, 1192 (9th Cir. 2003). *Dyer*,a bankruptcy case the Ninth Circuit was tasked with reviewing an order imposing punitive damages under 11 U.S.C. section 105(a).

The *Dyer* court, noting that the court's power under the statute was limited to measures necessary and appropriate to carry out the provision of title 11, held that the Bankruptcy Court's were limited to imposing civil remedies appropriate for civil contempt, compensatory or compliance-inducing but not punishment for bad conduct.

Section 6086.13 provides that monies collected pursuant to the statute shall be paid to Client Security Fund but that they shall not be collected if that would affect criminal penalities or civil judgment and could even be used to satisfy those penalities or judgments. The purpose outlined in the statute is neither compensatory or compliance-inducing; it is fine, levied as punishment, in most cases to be used to pay the claims of individuals who have no connection to the misconduct.

Moreover, proposed Rule of Procedure 5.137 provides that the amount of the fine increases with the degree of discipline and suggests a list of factors to be considered in setting the recommended fine, including:

1. Whether there was an intentional misappropriation of money;
2. The amount of the direct or indirect monetary loss to any victim(s);
3. Whether the misconduct was against a vulnerable victim, including but not limited to the aged, incapacitated, infirm, disabled, incarcerated, an immigrant, or a minor;
4.The seriousness of the conduct underlying the discipline;
5. Any prior discipline of the attorney;
6. The number of victims affected by the conduct in this matter (sic);
7. Whether the respondent has abandoned a client or the entire law practice;
8. Whether the respondent has been judicially sanctioned for engaging in abusive or frivolous conduct;
9. Whether the respondent has engaged in the unauthorized practice of law, or aided others in the unauthorized practice of law; and/or (sic)
10. Whether an underlying criminal conviction resulted in a significant jail sentence.

Every factor on this list shows that the intent to the statute and underlying rule is to punish bad people, and the badder, the more punishment.

The Legislature, of course, can enact a statute directing the State Bar to expand the purposes of

discipline to include punishing bad people, even if for the ostensible purpose of funding the Client Security Fund. But that decision should belong the Supreme Court in the exercise of its power in this area.

That purpose is chimerical, anyway, given the very difficult time the State Bar has had even collecting its costs from disciplined attorneys. Expecting to collect large amounts of money from a group after you have impaired their ability to earn of living does not make a lot of sense. Even if these monetary sanctions are approved, they will never make a significant dent in the amounts of money needed to keep the Fund operating in a timely way. Raising the $40 per year that each licensee pays into the fund seems politically impossible for some reason but that reason does not justify enacting a set of rules at odds with the fundamental purposes of the discipline system.

The Board of Trustees should decline to approve proposed Rule 5.137 and await direction from the California Supreme Court.

Very Truly Yours,

David C. Carr

ATTACHMENT B

# Rules of Procedure

# of the State Bar of California

## Rule 5.137 Imposition of Monetary Sanctions

**(A) The Supreme Court May Order Monetary Sanctions**

In any disciplinary matter in which the respondent is suspended, disbarred or resigns with charges pending, the Supreme Court may order the payment of a monetary sanction not to exceed $5,000 for each violation, to a maximum of $50,000 per order. (Business & Professions Code § 6068.13.) Monetary sanctions ordered will be in addition to any restitution or court costs ordered. The monetary sanction order may be set forth in a separate order.

**(B) Sanctions Shall Be Payable To The Client Security Fund**

If the Supreme Court orders the payment of monetary sanctions, the funds shall be made payable directly to the Client Security Fund by the respondent.

**(C) Determination of Monetary Sanction Amounts**

In any disciplinary matter in which the State Bar Court recommends that an attorney be ordered to pay monetary sanctions, the amount shall be determined using the ranges found in subsection (F) and considering the factors set forth in subsection (G). Recommended sanctions that deviate from the ranges must include a justification for the exception. The State Bar Court may recommend that the Supreme Court allow respondent to pay monetary sanctions in installments, or that they be waived based upon financial hardship.

**(D) Stipulations For Waiver Or Payment Plan For Monetary Sanctions**

The Office of the Chief Trial Counsel may enter into a stipulation with respondent or make a recommendation regarding whether any monetary sanctions should be ordered or waived; if ordered, in what amount; whether a payment plan will be allowed and the specifics of such plan, using the guidelines set forth is subsection (F) and (G). Such stipulations will be subject to approval by the State Bar Court

**(E) Respondent's Financial Hardship**

A Respondent may be granted relief, in whole or in part, from an order assessing monetary sanctions, or may be granted an extension of time to pay these sanctions in the

discretion of the State Bar Court, upon grounds of hardship, special circumstances, other good cause or if collection of monetary sanctions will impair a respondent's ability to pay criminal penalties or civil judgments arising out of transactions connected with the respondent's discipline. Respondent may seek relief from monetary sanctions through a motion filed with the State Bar Court, following the motion procedure set forth in Rule 5.130(B)-(E) of the State Bar Rules of Procedure. The burden of proof will be on the respondent to provide financial records and other proof in support of the motion.

**(F) Monetary Sanction Ranges**

Based upon the disciplinary sanction ordered in a case, the monetary sanction range per violation that respondent is found culpable of will be as follows:

1. Disbarment: $1,000- $5,000
2. Suspension: (Greater than 1 year)- $500 - $1,000
3. Suspension: (6 months to 1 year)- $100 - $500
4. Suspension: (less than 6 months) - $100- $250
5. Resignation with charges pending:- $0-$2500

**(G) Factors To Be Considered**

The State Bar Court will consider the following factors, in regards to any current or prior misconduct, in setting the amount of a sanction within the appropriate range in subsection (F):

1. Whether there was an intentional misappropriation of money;
2. The amount of the direct or indirect monetary loss to any victim(s);
3. Whether the misconduct was against a vulnerable victim, including but not limited to the aged, incapacitated, infirm, disabled, incarcerated, an immigrant, or a minor;
4. The seriousness of the conduct underlying the discipline;
5. Any prior discipline of the attorney;
6. The number of victims affected by the conduct;
7. Whether the respondent has abandoned a client or the entire law practice;
8. Whether the respondent has been judicially sanctioned for engaging in abusive or frivolous conduct;
9. Whether the respondent has engaged in the unauthorized practice of law, or aided others in the unauthorized practice of law; and/or
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